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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

PHILLIP GORDON,

Defendant and Appellant.

D073435

(Super. Ct. No. SCD270627)

APPEAL from a judgment of the Superior Court of San Diego County,
Melinda J. Lasater, Judge. Affirmed.

Andrea S. Bitar, under appointment by the Court of Appeal, for Defendant and
Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney
General, Julie L. Garland, Assistant Attorney General, Charles C. Ragland and Alana
Cohen Butler, Deputy Attorneys General, for Plaintiff and Respondent.

I.

INTRODUCTION

Defendant Phillip Gordon appeals a judgment of the trial court entered after he pled guilty to one count of making a criminal threat. Initially, in accordance with the plea agreement, the court placed Gordon on probation. However, after determining that Gordon had violated the terms of his probation by leaving San Diego County without first obtaining the approval of his probation officer, the court revoked Gordon's probation and sentenced him to the upper term of three years in prison.

On appeal, Gordon challenges the trial court's imposition of the upper term sentence. Specifically, Gordon contends that the court's decision to impose the upper term was arbitrary because the court deviated from its initial expressed intention to impose the middle term sentence, "primarily [because of] its belief that the victim had not called appellant the 'N' word," as Gordon suggested when he addressed the court at the sentencing hearing. He further asserts that the court abused its discretion in basing its sentencing decision on "unreliable hearsay" (capitalization & boldface omitted) from the probation report that did not support Gordon's contention that the victim and/or victim's group of friends had directed a racial epithet toward him. Gordon also contends that the trial court's decision was irrational because the court made contradictory statements, referring to Gordon's failure to accept responsibility for the offense and also commenting on Gordon's perception of his plea as being akin to a plea of no contest, which would not require that he accept responsibility for the offense.

We conclude that Gordon has not demonstrated that the trial court abused its discretion in imposing the upper term sentence. We therefore affirm the judgment of the trial court.

II.

FACTUAL AND PROCEDURAL BACKGROUND¹

On January 30, 2017, J.W. was locking up his bicycle and getting ready to walk into his downtown San Diego office when Gordon walked up to him and said, " 'I am going to kill you white boy.' " Gordon also "blew snot" toward J.W.'s leg. Because Gordon was behaving aggressively, J.W. dropped his bag and prepared to defend himself. He saw Gordon pull something out of his back pocket; J.W. was concerned because he thought that Gordon was pulling out a knife. In response, J.W. reached inside his bag to make it appear as if he was grabbing a weapon. This action seemed to prompt Gordon to leave. As Gordon walked away from J.W., he yelled obscenities, and other witnesses described hearing Gordon yell, " 'I'm going to kill all you white people!' " "

Meanwhile, several individuals who worked as Downtown Partnership Safety Ambassadors had observed Gordon brandish an object that they believed was a knife. These individuals flagged down a police officer for assistance. The officer located Gordon, approached him, and asked him whether he had a knife in his possession. Gordon walked away from the officer and refused to comply with the officer's repeated commands to stop. Several other officers assisted the first officer in detaining Gordon.

¹ Because Gordon pled guilty and no trial occurred, these facts are taken from the probation report.

Officers conducted a pat down search of Gordon and found a pair of scissors in the pocket of his pants. During the pat down, Gordon said to one of the officers, " 'Ima [*sic*] kill you bitch.' " The officers had to employ a maximum restraint device in order to place Gordon in the police car because he continued to violently kick in all directions and to disobey the officers' commands.

In an amended information, the San Diego County District Attorney's Office charged Gordon with one count of making a criminal threat (Pen. Code,² § 422; count 1); two counts of resisting an executive officer (§ 69; counts 2, 3); and one count of making threats to a public officer (§ 71; count 4). Gordon pled guilty to count 1 in exchange for the dismissal of the balance of the amended information and imposition of a term of formal probation.

At sentencing, the trial court suspended imposition of sentence and placed Gordon on three years of formal probation. The terms of probation included a requirement that Gordon serve 365 days in local custody, as well as a requirement that he obtain his probation officer's approval before leaving San Diego County.

In late November 2017, the People alleged that Gordon had violated the terms of his probation. A hearing was held in January 2018, at which time Gordon's probation officer testified that Gordon had called the probation officer in October 2017 and indicated that he was in custody in Paso Robles, California. The trial court found that

² All further statutory references are to the Penal Code unless otherwise indicated.

Gordon had violated the condition of his probation that he not leave San Diego County without first obtaining his probation officer's approval.

At the sentencing hearing for the probation violation, defense counsel requested that the court either reimpose probation, or sentence Gordon to the low term of 16 months,³ noting that Gordon's criminal record showed that in the past, he had committed primarily misdemeanor offenses. Defense counsel also mentioned that Gordon had some substance abuse and mental health issues, and that Gordon believed that the victim had referred to Gordon using the "N" word.

The trial court commented that a psychological examination of Gordon in May 2017 had determined that Gordon's mental state was normal and that he did not exhibit psychiatric symptoms or evidence of psychosis. The trial court noted, however, that letters that Gordon had written to the court seemed to demonstrate that he was "paranoid" or "perceiving things or hearing things, misinterpreting them." The court was concerned about the accuracy of Gordon's perception of the altercation underlying the offense. The trial court noted the possible sentencing options that were available and expressed concern that the probation department might not be able to adequately supervise Gordon if he was paranoid or had difficulty accurately perceiving events. The court also indicated concern that he might reoffend if placed on probation.

The prosecutor requested that the court sentence Gordon to either the upper term or the middle term, noting that Gordon had incurred at least one prior felony conviction,

³ See section 1170, subdivision (h)(1).

in Illinois, and that he had demonstrated an inability to control his anger, as evidenced by his numerous convictions for misdemeanor assault. The prosecutor argued that the probation department had not been able to effectively supervise Gordon, as demonstrated by Gordon's leaving the county without approval, and asserted that Gordon's extensive criminal history demonstrated that he poses a risk to the community.

Gordon asked to speak. At that point, the trial court indicated that the court was leaning toward imposing the middle term, and that it was up to Gordon whether he wanted to speak, but that doing so could alter the court's view of the appropriate sentence for him.

Gordon proceeded to tell the court that he was "not guilty of this 422," and that he had pled guilty only to get out of jail. Gordon contended that the victim had intentionally attempted to "sho[o]t a snot rocket" at him, and that the victim "had four other friends yelling, 'Go home, ["N" word]' " at Gordon. Gordon also suggested that he was not the person who committed all of the offenses alleged as his priors, and claimed that he has a face that is recognizable.

After Gordon finished speaking, the court said, "I don't think he helped himself." The court noted its concerns, including that Gordon posed a high risk to the community because of his perception of what had occurred during the altercation. The court commented that Gordon "does sometimes seem to be viewing things differently than other people are viewing them." The court then revisited what it deemed to be the "biggest issue," i.e., the numerous prior convictions that Gordon had incurred as an adult. The court noted that the conduct underlying these convictions appeared to be a

"precursor" to the underlying offense and expressed concern that Gordon's failure to take responsibility for his conduct meant that he continued to pose a risk to the community. The trial court proceeded to impose the upper term sentence of three years in state prison.

Defense counsel inquired whether the trial court's decision to impose the upper term was due to a concern that Gordon's perceptions constituted a risk to the community. The court said, "That's part of it. It ties in with all of it. I'm very carefully not using what the probation officer said occurred in northern California because as I said, I was at the midterm. But his statements in terms of this particular offense is what put me up and over to a large degree, but that combined with the other issues. And, again, I agree. All he did was leave without permission."

Defense counsel then asked the court whether, in its comments regarding Gordon's perceptions, the court was referring to the statements that Gordon had made regarding having been called the "N" word. The court replied, "That's a good portion of it. Yes. That's his perception." Defense counsel expressed concern that the court was relying on the version of the facts set forth in the police report, and not crediting Gordon's version of the facts surrounding the underlying offense. The court noted that Gordon had pleaded guilty to the charge, and further indicated that it understood Gordon's position at sentencing to be that he had pleaded guilty only to avoid certain consequences, and that he possibly viewed his plea as being similar to a *People v. West* plea, even though that was not the type of plea that he had entered.

Defense counsel argued that the trial court should not increase the sentence based on Gordon's statement, referred to in the probation report, that he believed that a racial

epithet had been used against him. Counsel noted that the facts underlying the offense could have happened in the way that Gordon claimed they had. The court indicated that it was the court's view that Gordon had failed to accept responsibility for his conduct, and that he had demonstrated an inability to deal with the situation. The court indicated that it believed that Gordon is very bright, but that, given his statement to the court, he also posed a great risk of reoffending.

Defense counsel countered that *People v. West* pleas are permissible and questioned the probation officer's reliance on a prior conviction from Chicago as a basis for recommending imposition of the upper term. The court stated that although *People v. West* pleas are permissible, Gordon's plea was not entered pursuant to *People v. West*. The court also noted that it had verified that Gordon's conviction from Chicago was a felony. Defense counsel reiterated his disagreement with the imposition of the upper term sentence. At that point, the discussion regarding which term the court would impose ended and the court proceeded to set forth other sentencing terms, including fines and fees.

Gordon filed a timely notice of appeal.

III.

DISCUSSION

Gordon challenges the trial court's imposition of the upper term sentence. Specifically, Gordon contends that the court's decision to impose the upper term was arbitrary, and an unjustified deviation from the court's initial expressed intention to impose the middle term sentence. He further asserts that the court based its sentencing

decision on "unreliable hearsay" (capitalization omitted) presented in the probation report. Gordon also contends that the trial court's decision was irrational because the court made contradictory statements, stating that Gordon refused to accept responsibility for his actions but also stating that Gordon apparently believed that his guilty plea was, in essence, a no contest plea, since Gordon stated that he had pled guilty only to avoid other consequences.

Under section 1170, subdivision (b), "[w]hen a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the choice of the appropriate term shall rest within the sound discretion of the court." " (*People v. Jones* (2009) 178 Cal.App.4th 853, 862.) A trial court has the discretion "to select among the lower, middle, and upper terms specified by statute without stating ultimate facts deemed to be aggravating or mitigating under the circumstances and without weighing aggravating and mitigating circumstances. [Citations.] Rather, 'a trial court is free to base an upper term sentence upon any aggravating circumstance that the court deems significant, subject to specific prohibitions.' " (*Id.* at p. 866.) "In determining the appropriate term, the court may consider the record in the case, the probation officer's report, other reports . . . , and statements in aggravation or mitigation submitted by the prosecution, the defendant, or the victim, or the family of the victim if the victim is deceased, and any further evidence introduced at the sentencing hearing. The court shall select the term which, in the court's discretion, best serves the interests of justice. The court shall set forth on the record the reasons for imposing the term" (§ 1170, subd. (b).)

California Rules of Court, rules 4.421 and 4.423 set forth circumstances in aggravation and mitigation for purposes of the court's decision as to which term to choose. However, in weighing the aggravating and mitigating factors, particular sentencing criteria have no fixed mathematical values. (*People v. Regalado* (1980) 108 Cal.App.3d 531, 539.) "Neither section 1170 nor the California Rules of Court attempt to provide an inclusive list of aggravating circumstances. Thus, a trial court is free to base an upper term sentence upon any aggravating circumstance that (1) the court deems significant and (2) is reasonably related to the decision being made." (*People v. Moberly* (2009) 176 Cal.App.4th 1191, 1196.)

A trial court's decision to impose an upper term sentence is subject to review for abuse of discretion. (*People v. Sandoval* (2007) 41 Cal.4th 825, 847.) "The trial court's sentencing discretion must be exercised in a manner that is not arbitrary and capricious, that is consistent with the letter and spirit of the law, and that is based upon an 'individualized consideration of the offense, the offender, and the public interest.' . . . [A] trial court will abuse its discretion under the . . . scheme if it relies upon circumstances that are not relevant to the decision or that otherwise constitute an improper basis for decision." (*Ibid.*, citation omitted.)

Under these rules, it is clear that "the existence of a single aggravating circumstance is legally sufficient to make the defendant eligible for the upper term." (*People v. Black* (2007) 41 Cal.4th 799, 813.) Circumstances in aggravation include consideration that a defendant's convictions are "numerous or of increasing seriousness,"

and that his prior performance on probation or parole was unsatisfactory. (Cal. Rules of Court, rule 4.421(b).)

The trial court provided a number of reasons for its selection of the upper term sentence. The court's remarks reflect its reliance on factors in aggravation such as Gordon's lengthy and extensive criminal history, including numerous prior convictions dating back to the 1990's. (See Cal. Rules of Court, rule 4.421(b)(2).) The probation report noted that Gordon's convictions included a 2005 conviction in Chicago for misdemeanor battery, a 2010 conviction for criminal damage to property, a 2013 conviction for felony drug possession, a 2013 conviction in Chicago for misdemeanor battery, and a 2015 conviction in North Carolina for resisting a peace officer. Also, in 2016, Gordon was convicted of disturbing the peace by fighting, noise, and/or offensive words. The court was concerned that Gordon's record demonstrated continual engagement in criminal conduct, despite having been provided many opportunities to reform.

In addition, the court considered the facts of the dismissed counts of resisting a peace officer, in accordance with Gordon's *Harvey* waiver.⁴ The court further noted that Gordon has a history of this type of conduct. Thus, the trial court's sentencing decision

⁴ See *People v. Harvey* (1979) 25 Cal.3d 754. The language included in Gordon's *Harvey* waiver was as follows: "The sentencing judge may consider my prior criminal history and the entire factual background of the case, including any unfiled, dismissed or stricken charges or allegations or cases when granting probation, ordering restitution or imposing sentence."

was based in part on Gordon's pattern of recidivism; this is clearly a factor in aggravation on which the trial court may rely in selecting an upper term sentence.

Further, the trial court noted that Gordon had performed poorly on probation in the past and that he was on probation in Santa Clara County at the time of the underlying offense, both of which are listed as circumstances in aggravation in the Rules of Court (see Cal. Rules of Court, rules 4.421(b)(4), 4.421(b)(5)). Significantly, the court concluded that there were no apparent circumstances in mitigation. In light of the existence of multiple aggravating circumstances and no mitigating circumstances, the court reasonably exercised its discretion in imposing the upper term.

We reject Gordon's contentions that the trial court relied on improper factors in imposing the upper term. Gordon argues that the trial court improperly relied on hearsay statements contained in the probation report in discrediting Gordon's assertion that the victim was seemingly at fault in the incident for somehow causing his friends to direct a racial epithet at Gordon. However, the record demonstrates that the trial court did not sentence Gordon to the upper term simply because he made this assertion about the victim. Rather, the court's primary concern after hearing from Gordon at the sentencing hearing was the fact that he accepted no responsibility for his own criminal conduct, and instead attempted to shift most of the blame to the victim. Further, the trial court was permitted to rely on the factual assertions contained in the probation report—factual assertions that contradicted Gordon's version. It is clear that a trial court may consider a probation report when weighing circumstances in aggravation or mitigation at sentencing. (§ 1170, subd. (b); 1203, subd. (b)(3).) California courts "routinely rely upon hearsay

statements contained in probation reports to make factual findings concerning the details of the crime." (*People v. Otto* (2001) 26 Cal.4th 200, 212.) Thus, the trial court did not abuse its discretion in considering the facts, as presented in the probation report, despite those facts being at odds with what Gordon claimed had happened.

Finally, Gordon argues that the trial court's sentencing choice was irrational because the court purportedly contradicted itself by noting that Gordon demonstrated a failure to accept responsibility, and also stating that Gordon's plea was akin to a *People v. West* plea. However, this argument takes the trial court's statements out of context and fails to acknowledge that the court was simply commenting on Gordon's own statement that he had pled guilty only to avoid other consequences. A plea made pursuant to *People v. West* is a plea of nolo contendere, not admitting a factual basis for the plea." (*In re Alvernaz* (1992) 2 Cal.4th 924, 932.) However, Gordon entered a guilty plea, not a *People v. West* plea. In doing so, Gordon admitted that on the dates charged, he "willfully threatened to commit a crime which would result in death with the specific intent it be taken as a threat."

Indeed, the court specifically stated, "But he's the one who pled guilty to the charge, and I understand his position is that he did it in order to -- basically, it was a *People v. West* plea, even though the form doesn't say it. *That's his perception of it*, and it did go through a preliminary hearing." (Italics added.)

The court repeatedly noted that Gordon had not entered a *People v. West* plea, and yet, he continued to deny personal responsibility for the underlying offense. The court could thus have reasonably concluded that Gordon's distorted perception of what had

occurred, and specifically, his failure to accept responsibility despite his admission during his guilty plea that he had threatened another person, indicated that Gordon represented a continued risk to the community. The trial court's statements regarding *People v. West*, made at the sentencing hearing, in no way reflect an irrational sentencing choice.

IV.

DISPOSITION

The judgment is affirmed.

AARON, J.

WE CONCUR:

BENKE, Acting P. J.

HUFFMAN, J.